No. 241

In the Supreme Court of the United States

OCTOBER TERM, 1958

LYDDON & COMPANY (AMERICA) INC., PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Claims (Pet. 10-17) is reported at 158 F. Supp. 951.

JURISDICTION

The taxpayer's motion for summary judgment was denied on March 5, 1958. (Pet. 10, 16.) On May 7, 1958, the order was amended to provide, in addition, for dismissal of the taxpayer's petition. (Pet. 18.) The petition for a writ of certiorari was filed on July 31, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether, in a tax refund suit, a taxpayer may obtain a refund of taxes which it does not now con-

tend were not properly due and owing, on the ground that no notice of deficiency was sent to it by the Commissioner as required by Section 272(a)(1) of the Internal Revenue Code of 1939.

STATUTES INVOLVED

The relevant provisions of Sections 271(a), 272(a), and 3770(a) of the Internal Revenue Code of 1939 may be found in the Appendix, *infra*, pp. 9-10.

STATEMENT

The taxpayer is a New York corporation. (R. 1.) For its fiscal years ended June 30, 1942, to June 30, 1945, inclusive, taxpayer filed excess profits tax returns which gave the taxpayer's name and address and stated that taxpayer was exempt from excess profits taxes. These returns were not otherwise filled out and gave no information upon which a tax could be computed or assessed. (R. 2-3.) In February, 1946, the taxpayer filed amended excess profits tax returns for each of these years, containing information and computations resulting in the following amounts of excess profits tax (R. 3-4):

Year	*Amount*
June 30, 1942	$ 1,057.37
June 30, 1943	62,157.57
June 30, 1944	16,158.96
June 30, 1945	22,653.28

Attached to the inside of each of these returns was a rider in which the taxpayer again claimed it was exempt from excess profits taxes. (R. 3, 11-12.)

On the March, 1946, assessment list, the Commissioner of Internal Revenue assessed taxes and interest

against the taxpayer based on the amount of tax liability shown on the face of the amended returns. (R. 33.) On May 6, 1946, the taxpayer was given notice of such assessments. Each notice stated the date of the assessment list and the amount of the assessment, and made demand for the immediate payment thereof. (R. 4, 34; Ex. J-M to Affidavit of William L. Kauffman.)

On November 26, 1946, the taxpayer by letter protested the action of the Commissioner in assessing taxes and interest without giving the taxpayer a 90-day deficiency notice as required by Section 272 (a)(1) of the Internal Revenue Code of 1939. Similar protests were made on December 9, 1946, and May 24, 1948. (Ex. N-Q to Affidavit of William L. Kauffman.)

The taxes and interest in dispute were paid in 1951 and 1952, in part by the crediting of certain overassessments and in part by checks sent by the taxpayer. All of the payments were made within six years of the Commissioner's original assessment of March, 1946. (R. 4-7, 34-37.)

The taxpayer then filed timely claims for refund, and no action having been taken on them within six months, filed its petition in the Court of Claims. (R. 8-9, 37-38.) In that court the taxpayer filed a motion for summary judgment (R. 39), relying solely on its position that the taxes and interest were illegally collected, the illegality resulting from the failure to send a deficiency notice prior to the assessments (R. 40-55). Prior to filing the motion the taxpayer advised the Commissioner of the Court of Claims that it did not intend to try the question of liability for the

taxes, but would rest its case solely on the legality of the assessment. (R. 108.) The Court of Claims denied the motion for summary judgment. (R. 107.) Thereafter the taxpayer advised the Commissioner that it waived its right to offer evidence on the issue of its substantive liability for the excess profits taxes in question. (R. 109). The Court of Claims thereupon entered an order dismissing the taxpayer's petition. (Pet. 18.)

ARGUMENT

This is a tax refund suit in which the taxpayer is seeking recovery of taxes paid although it has made no effort to show that the amounts paid did not represent its correct tax liability, and has stated that it does not desire to make such a showing. The denial of taxpayer's motion for summary judgment and dismissal of its petition by the Court of Claims was consistent with the principles set forth by this Court in *Lewis* v. *Reynolds*, 284 U.S. 281, 283, that—

> An overpayment must appear before refund is authorized. Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received, when they do not exceed the amount which might have been properly assessed and demanded.

See, also, *Stone* v. *White*, 301 U.S. 532, rehearing denied, 302 U.S. 639.

The taxpayer's contention is that under Section 272(a)(1) of the Internal Revenue Code of 1939 (Apendix, *infra*, pp. 9-10) the assessment of March,

1946, was wholly void (Pet. 8), that the statute of limitations on making an assessment expired on June 30, 1951 (Pet. 5), and therefore (Pet. 8) that the taxes paid after that date must be refunded pursuant to Section 3770(a)(2) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 10). This contention disregards the fact that this Court in *Lewis* v. *Reynolds*, *supra*, and in *Stone* v. *White*, *supra*, declined to give such broad effect to the predecessor of Section 3770(a)(2).

Furthermore, it rests upon a questionable interpretation of Section 272(a)(1), one rejected not only by the Court of Claims, but also by the Courts of Appeals for the Ninth and Tenth Circuits. That section provides that the Commissioner, when he determines that there is a deficiency, is authorized to send notice of such deficiency to the taxpayer. It then provides that within ninety days the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Then follow the provisions here relevant:

> No assessment of a deficiency in respect to the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

The taxpayer did not seek an injunction, although it could have enjoined assessment or collection under this section, assuming *arguendo* that on the basis of the returns there was a deficiency, and that a notice of deficiency was therefore appropriate (but see opinion below, Pet. 12-13). Rather, taxpayer rested on its present contention that the assessment was wholly void.

Taxpayer relies upon *United States* v. *Yellow Cab Co.*, 90 F. 2d 699 (C.A. 7th), and *United States* v. *Barber*, 24 F. Supp. 229 (D. Md.). These cases do support taxpayer's position. They were decided, however, prior to the decision of the Court of Claims in *Lehigh Portland Cement Co.* v. *United States*, 30 F. Supp. 217, in which the court, in an exhaustive opinion by Judge Littleton, traced in detail the legislative history of the applicable provisions, concluding that an assessment in disregard of the section could be enjoined but was not wholly void. The *Lehigh Portland Cement* case was followed in *Ryan* v. *Alexander*, 118 F. 2d 744, 750 (C.A. 10th), certiorari denied, 314 U.S. 622.

Ventura Consolidated Oil Fields v. *Rogan*, 86 F. 2d 149 (C.A. 9th), certiorari denied, 300 U.S. 672, was not a refund case, but an injunction suit. Subsequently, in *Van Antwerp* v. *United States*, 92 F. 2d 871, the Court of Appeals for the Ninth Circuit, speaking through the same judge as in *Ventura*, held that in a refund suit the taxpayer must show that he does not owe the tax, regardless of the legality of collecting an alleged deficiency without giving the statutory deficiency notice. The Ninth Circuit relied upon the principle set out by this Court in *Lewis* v.

Reynolds, *supra*, and distinguished (p. 874) the *Yellow Cab Co.* case on the ground that, although that was a refund suit, the court there was not asked to consider the relevance of the principle that in a refund suit the taxpayer must show he does not owe the tax.

Accordingly, the Courts of Appeals for the Ninth and Tenth Circuits agree with the construction placed on Section 272(a)(1) by the Court of Claims. The decision of the Court of Appeals for the Seventh Circuit to the contrary was given without the benefit of the research in the *Lehigh Portland Cement* case, and without consideration of the principles applicable to refund suits. There is not, therefore, such a conflict among the Courts of Appeals as to call for the present intervention of this Court.

Furthermore, the question is one of infrequent occurrence. The present case is an unusual one, starting with a return which, as the court below points out (Pet. 13), was ambiguous. The taxpayer could have presented its contention as to the invalidity of the assessment by an injunction suit, but chose not to do so.[1] It has had its day in court in the present refund suit, and has rejected its opportunity to show that the taxes assessed were not in fact due.

The taxpayer also relies (Pet. 7-8) on the dissenting opinion below (Pet. 17) which would distinguish the *Lehigh Portland Cement* case on the ground that

[1] The taxpayer contends that this is not an adequate remedy because of the requirement of posting a bond. (Pet. 7.) It does not suggest that in its own case this requirement was an obstacle. Furthermore, the injunction is the remedy which Congress has prescribed.

there the taxpayer had a notice of deficiency, even though the assessment was premature, while here no notice had been issued. However, we think the difference is immaterial, a view reflected in the Ninth Circuit decision in the *Van Antwerp* case, *supra*, where the broad general principle was recognized that one who confessedly owes a tax cannot rely upon technicalities in order to obtain a refund. That is the principle which the majority of the court below properly recognized and which alone suffices to dispose of the taxpayer's present contentions.

It may be that taxpayer could not have appealed to the Tax Court because no notice of deficiency was issued. But this has become immaterial here, since taxpayer is no longer contesting the merits of the assessment, and accordingly there would be nothing for the Tax Court to pass upon.

CONCLUSION

For the foregoing reasons, we submit that the petition for certiorari should be denied.

Respectfully submitted,

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AUGUST, 1958

APPENDIX

Internal Revenue Code of 1939:

SEC. 271. DEFINITION OF DEFICIENCY.

(a) [As amended by Sec. 14(a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231][2] *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) [As amended by Sec. 504(c), Revenue Act of 1942, c. 619, 56 Stat. 876; Sec. 203(a), Act of December 29, 1945, c. 652, 59 Stat. 669] *Petition to the Tax Court of the United States.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the

[2] Effective for years after December 31, 1941. The amendment did not substantively change the prior law.

Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 272.)

SEC. 3770. AUTHORITY TO MAKE ABATEMENTS, CREDITS, AND REFUNDS.

(a) *To Taxpayers.*—

* * * *

(2) *Assessments and collections after limitation period.*—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3770.)

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